



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6

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DALLAS, TEXAS 75202-2733

DEC - 4 2017

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Mr. Chris Linendoll, E.I.T., Section Manager
Wastewater Permitting Section (MC-148)
Texas Commission on Environmental Quality (TCEQ)
Post Office Box 13087
Austin, Texas 78711-3087

Re: Interim Objection of Draft Permit
TPDES Permit No. TXR040000
General Permit (MS4)

Dear Mr. Linendoll:

Thank you for the opportunity to review the proposed draft permit transmitted in your letter received on September 5, 2017. Based upon the information provided, it is not clear how this permit conforms to the guidelines and requirements established by the Clean Water Act (CWA) and the NPDES regulations. Item by item comments and concerns, including recommendations for clarification are included below. Please provide additional information to address these concerns.

1. **Clear, Specific, and Measurable Terms - CFR §122.34.(a):** The proposed permit has conditions that do not appear to meet the requirement that permits include clear, specific, and measurable requirements, including requirements addressing the minimum control measures, any water quality-based requirements, and the evaluation, recordkeeping, and reporting requirements. Examples are included in the attachment to this letter.
2. **Two-step General Permit CFR § 122.28.(d).(2).(ii) - Public Participation on revised SWMPs/Permit Modification (40 CFR § 122.62, or § 122.63):** It is not clear that changes to programs that are adopted by TCEQ as permit conditions, but are later proposed to be revised and would trigger permit modification requirements will also be subject to required public participation/permit modification procedures. It appears TCEQ intends to adopt the entire Storm Water Management Program, after required Step 2 notice and comment procedures, as permit conditions making the distinction between changes that are minor replacement of BMPs to meet a permit condition and replacement of a permit condition requiring permit modification less obvious. See also attachment to this letter.
3. **Compliance Schedules 40 CFR § 122.47:** Compliance schedules must require compliance by the permittee "as soon as possible", but may not extend the date for final compliance beyond compliance dates established by the CWA. In several instances, the proposed permit appears to extend several compliance schedules for tasks that were to be completed under the previous permit term. Examples are provided in the attachment.


Sufficiently Sensitive Analytical Methods 40 CFR Part 136 and 40 CFR chapter I, subchapter N or O: It is unclear if the sampling data collected by the permittees under various sections of the permit and the SWMP will be required to meet the sufficiently sensitive analytical methods approved under 40 CFR part 136.

Comments:

1. **Two-step General Permit – Authorization Approval Process – CFR 122.28.(d).(2).(ii):**
Regardless of the permitting approach chosen by the NPDES authority, permit requirements must be enforceable, and must provide a set of performance expectations and schedules that are readily understood by the permittee and the public. It is unclear how the permit and/or fact sheet conveys to the public how NOI submittals must meet or will be translated at the second step into conditions that will be adopted by TCEQ as permit requirements. EPA is available to work with the state to identify areas of the permit and/or fact sheet where a clear discussion of the state's Two-Step process could be set forward, and recommend language that is consistent with the MS4 General Permit Remand Rule for explaining how elements from each MS4's NOI and SWMP are made enforceable.
2. **Streamlining MOA Review of Permit Conditions Established in Step 2 - CWA Section 402(d), MOA Section IV.C.:** Under the Two-Step General Permit approach, EPA has authority to review all terms and conditions of the permit, whether established in a base general permit or in the second step that establishes permit terms and conditions for individual MS4s. With the large number of regulated MS4s in Texas, EPA recommends our agencies work together to streamline Step 2 review process. EPA also recommends that TCEQ reconsider establishing conditions for some program elements in the general permit itself which would eliminate the need for permittee's to propose as many programs under Step 2 and therefore could significantly reduce the administrative burdens on permittees, TCEQ and EPA in proposing, establishing and reviewing permit conditions under Step 2. See also attachment to this letter.

We will be happy to work with you and your staff to clarify or resolve these concerns. Should you have any questions, please call me at (214) 665-7170, or have your staff contact Greg Valentine at (214) 665-3111 or by email at valentine.greg@epa.gov.

Sincerely,


for Stacey B. Dwyer, P.E.
Associate Director
NPDES Permits and TMDLs Branch

cc (electronic): Rebecca Villalba, Stormwater and Pretreatment Team Leader (MC-148)
Wastewater Permitting Section Division, TCEQ

Attachment

Below are a few instances where issues in Comments 2, 3, and 5 were noted, although identified in several other portions of the draft permit:

1. **Clear, Specific, and Measurable Terms - CFR §122.34.(a)**: Permit requirements must be enforceable, provide a set of performance expectations, set clear schedules, and include conditions that measure the permittee's actions. The proposed permit should be revised to delete (or clearly define) unclear words such as "appropriate", "as needed", "as soon as practicable", "as applicable", etc. Perhaps, the NOI checklist and the internal NOI approval checklist could serve as a "tool" to define the permit performance expectations, including definitions of specific tasks, specific schedules for implementation and maintenance, and frequency of actions. Please see below some examples of permit language where the permit is not clear, specific, or does not include measurable terms:

1.1 Part II.D.4(a)(3) Identification of Benchmarks as Permit Conditions: The permit states: *"Benchmarks are not numeric effluent limitations or permit conditions but intended to be guidelines for evaluating progress towards reducing pollutant discharges consistent with the benchmarks."* The definition of "Benchmark" in the previous sentence also uses the word "Benchmark." What is the definition of "benchmark" in relationship to applicable water quality standards and/or improvement of water quality? Later on in Part II.D(a), benchmarks are linked with waste load allocations (WLAs). If "Benchmarks" are not permit conditions, therefore WLAs are not permit conditions. The definition of "Benchmarks" should be included in Part I "Definitions" in terms of permit conditions intended to measure water quality improvement and attainment of applicable water quality standards as required in the CWA.

1.2 Part II.D.4(a)(3)(a) Monitoring/Assessment Plan: Part II.D(a)(3) indicates that permittees should develop a Monitoring/Assessment Plan as required in Part II.D.4(a)(6) in case an aggregate allocation is used as a benchmark. Part II.D.4(a)(6) does not reference such a plan. Please amend Part II.D.4(a)(6) accordingly.

1.3 Part II.D.4(a)(5): The permit states *"If the pollutant of concern is bacteria, the permittee shall include focused BMPs addressing the below areas, as applicable, in the SWMP and implement as appropriate."* If a TMDL Implementation Plan (I-Plan) is available, the permittee may refer to the I-Plan for appropriate BMPs.....*The BMPs shall, as appropriate, address the following:*

The definition of the words: "focused BMP, applicable, and appropriate" are unclear in the previous sentence. EPA recommends amending the sentence as follows: *If the pollutant of concern is bacteria, the permittee shall implement ~~include focused BMPs~~ addressing the below areas according to the approved ~~applicable, in the SWMP and implement as appropriate~~."* If a TMDL Implementation Plan (I-Plan) is available, the permittee may refer to the I-Plan for identification of BMPs ~~appropriate BMPs~~.....*The BMPs shall, as appropriate, address the following:*

1.4 Part I.D.4(a)(6) Monitoring or Assessment of Progress: According to the permit, the SWMP must include methods to be used in achieving benchmarks and determining the

effectiveness of BMPs. It is unclear if the permit is referring to the analytical methods to be used to analyze water quality either in the receiving water (or in the discharge) or the requirements included in Part I.D.4(a)(6)(a).

1.5 Part I.D.4(a)(6) Monitoring or Assessment of Progress/Assessing Improvements in

Water Quality: The requirements included in this section are specifically directed to measure progress toward benchmarks. Part I.D.4(a)(6) should clearly require permittees to measure progress towards achieving water quality standards.

1.6 Part I.D.4(b) Discharges Directly to Water Quality Impaired Water Bodies without an Approved TMDL - Impairment of Bacteria

The permit states “*Where the impairment is for bacteria, the permittee shall identify potential significant sources and develop and implement focused BMPs for those sources. The permittee may implement the BMPs listed in Part II.D.4(a)(5) or proposed alternative BMPs as appropriate.*” What is the timeframe or schedule to implement this requirement?

1.7 Part I.D.5 Discharge to the Edwards Aquifer Recharge Zone: According to the permit, BMPs and maintenance schedules for structural stormwater controls, may be required as a provision of the Edwards Aquifer rule. Permit requirements must be enforceable and provide a set of performance expectations. What are the set of performance standards defined by TCEQ to approve program authorizations?

1.8 Part I.E.6 SWMP Updates: According to TCEQ, changes that are made to the SWMP before the NOI is approved by the TCEQ must be submitted in a letter providing supplemental information to the NOI. The process to submit such updates is not clear. As noted previously, EPA is interested in further discussions with the State to ensure that this process is consistent with the Remand Rule.

1.9 Part I.E.16(d) Public Notice Process for NOI submittal: It is not clear if the public will have the opportunity to request a public hearing. Please clarify.

2. Two-step General Permit - Public Participation on revised SWMPs – Permit Modification (40 CFR § 122.62 or § 122.63): Examples where approved SWMP will be amended. The public will not have the opportunity to comment on the basis for those amendments:

2.1 Part II.D.4 Impaired Water Bodies and Total Maximum Daily Load (TMDL): The proposed General Permit added a requirement that MS4s annually check, in conjunction with preparation of the annual report, if a waterbody has been added to the latest EPA approved *Texas Integrated Report of Surface Water Quality for Clean Water Act (CWA) Sections 305(b) and 303(d)*. Newly listed waters must be addressed in the SWMP within two years following the approval date of the new list(s), following a notice of change process which allows permittees to amend the SWMP during the permit term. An NOC must be submitted according to Part II.E.6. What is the meaning of addressing newly listed waters in the SWMP? Does the permittee need to add new BMPs to address a new pollutant of concern? If the permittee amends the SWMP to add a new BMP to address a newly listed impaired water body or add a specific BMP required in the TMDL Plan, a major permit modification may be warranted.

2.2 Part II.D.4(a)(3): The BMPs addressing the pollutant of concern must be re-evaluated on an annual basis for progress towards the benchmarks and modified as necessary within an adaptive management framework. As noted previously, EPA is interested in further discussions with the State to ensure that this process is consistent with the Remand Rule with respect to modifying permit requirements.

2.3 Part I.D.4(a)(7) Observing No Progress Towards the Benchmark: The permit states “*If, by the end of the third year from the effective date of the permit, the permittee observes no progress toward the benchmark either from program implementation or water quality assessments as described in Part II.D.4(a)(6), the permittee shall identify alternative focused BMPs that address new or increased efforts towards the benchmark or, as appropriate, shall develop a new approach to identify the most significant sources of the pollutant(s) of concern and shall develop alternative focused BMPs for those (this may also include information that identifies issues beyond the MS4’s control).* These revised BMPs must be included in the SWMP and subsequent annual reports.”

2.4 Part I.D.4(b) Discharges Directly to Water Quality Impaired Water Bodies without an Approved TMDL - Discharging a Pollutant of Concern: The permit states “*In addition, no later than three years following the permit effective date, the permittee shall submit an NOC to amend the SWMP to include any additional BMPs to address the pollutant(s) of concern.*” As noted previously, EPA is interested in further discussions with the State to ensure that this process is consistent with the Remand Rule with respect to modifying permit requirements.

2.5 Part I.D.5 Discharge to the Edwards Aquifer Recharge Zone: The permit states that for existing discharges, the requirements of the agency-approved Water Pollution Abatement Plan (WPAP) under the Edwards Aquifer Rule are in addition to the requirements of this general permit. Later on the permit also states that approved WPAPs that are required by the Edwards Aquifer Rule must be referenced in the SWMP. Additional agency-approved WPAPs received after the SWMP submittal must be recorded in the annual report for each respective permit year. What is the process of public participation on WPAP? What is the time frame to develop, approve, and implement WPAPs? It is not clear if the newly received WPAPS will define new permit terms to specific MS4s.

2.6 Part I.E.5 SWMP Updates Required by TCEQ: Per TCEQ, changes may be made to the SWMP during the permit term. The TCEQ may notify the permittee of the need to modify the SWMP to be consistent with the general permit, in which case the permittee will have 90 days to finalize such changes to the SWMP. EPA is interested in working with the State to suggest ways in which this process can be clarified or modified to be made consistent with the Remand Rule.

2.7 Part I.E.6 SWMP Updates: Per TCEQ, all other changes, such as adding newly listed impaired water bodies or an approved TMDL to update the SWMP as applicable, must be submitted on an NOC form and may only be implemented following written approval by TCEQ. The words “applicable” and “implemented” are unclear in this condition. As stated previously, this is an area that EPA will work with the State to suggest potential revision to ensure these requirements are consistent with the Remand Rule.

2.8 Part I.E.7 Transfer of Ownership, Operational Authority, or Responsibility for SWMP

Implementation: Within ninety (90) days of a transfer of ownership, operational authority, or responsibility for SWMP implementation, the permittee shall have a plan for implementing the SWMP in all affected areas. The plan must include schedules for **implementation, and information on all new annexed areas. As stated previously, this is an area that EPA will work with the State to suggest potential revision to ensure these requirements are consistent with the Remand Rule.**

3. The proposed permit extends several compliance schedules: The proposed permit extends several compliance schedules: To ensure permittees are not provided additional time to comply with requirements of previously issued iterations of this permit, language in the General permit needs to be modified. Below are some examples:

3.1. Part I.D.4(b) Discharges Directly to Water Quality Impaired Water Bodies without an

Approved TMDL - Discharging a Pollutant of Concern: Within one year the permittee will determine source of pollutant; within two years the SWMP will include focused BMPs along with measurable goals; within three years, the permittee shall submit a NOC to amend the SWMP. Is this requirement applicable to new areas and new pollutants of concern? This requirement was included in the existing permit and it may extend implementation schedules to existing areas and pollutants. Based on the information from Annual Reports, what are the specific stormwater controls that the permittees need to implement to address impaired water bodies without TMDLs?

- 3.2. **Part I.E.3 SWMP General Requirements:** According to TCEQ, the SWMP must include, as appropriate, the months and years in which the permittee will undertake required actions, including interim milestones and the frequency of the action throughout the permit term. After reviewing the internal approval NOI checklist, it is not clear if the permittee will extend schedules included in the current permit.

- 3.3. **Part III.A.1(b) Implementation of the SWMP:** As written, it is not very clear if the permittee will extend schedules. Implementation schedules should be clear in both the General Permit and approved SWMP.

- *Existing small MS4 operators shall ensure full implementation of any new elements in the revised SWMP as soon as practicable, but no later than five years from the permit effective date.*
- *Designated small MS4s must achieve full implementation of the SWMP as soon as practicable, but no later than five years from designation. It is not very clear if the permittee will extend compliance schedules.*